

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
SUMMIT WIRELESS, LLC and) File Nos. 0000818492, 0000818498
SUMMIT WIRELESS WOW, LLC)
Request for Waiver and Extension of the)
Broadband PCS Construction Requirements)

ORDER

Adopted: June 7, 2002

Released: June 10, 2002

By the Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

1. In this Order, we address a request by Summit Wireless, LLC and Summit Wireless WOW, LLC (collectively, Summit) for an additional four months to meet the construction requirements for six broadband Personal Communications Services (PCS) licenses. For the reasons set forth below, we grant Summit an additional four months to meet the PCS construction requirement as modified herein.

2. Since late 1999, Summit has acquired a number of broadband PCS licenses, including the authorizations for the F-Block in the following six Basic Trading Areas (BTAs): Bozeman, MT (BTA053), Butte, MT BTA (BTA064), Helena, MT BTA (BTA188), Kalispell, MT BTA (BTA224), Missoula, MT BTA (BTA300), and Riverton, WY BTA (BTA375). Pursuant to section 24.203(b) of the Commission's rules, 10 MHz broadband PCS licensees, which includes F-Block licensees, are required to provide service to at least one-quarter of the population of their BTAs or make a showing of substantial service within five years of initial license grant. Failure to comply with the construction requirement would result in automatic termination of the license. Based on their original grant date, the five-year deadline for the instant six licenses was April 28, 2002. On March 21, 2002, Summit filed a request for an additional four months (i.e., from April 28, 2002 to August 28, 2002) to meet the construction benchmark in these six BTAs in Montana and Wyoming. Summit supplemented its request on May 8, 2002, by identifying specific areas in these BTAs that it is focusing its initial build-out and that it claims

1 See File Nos. 0000818492 and 0000818498. The two licensees make a joint request for waiver and extension (Extension Request).

2 The call signs for the Licenses are, respectively: KNLG961, KNLF935, KNLG960, KNLG965, KNLG957, and KNLH394. Summit Wireless, LLC holds all of the authorizations except for the Riverton, WY BTA (call sign KNLH394) which is held by Summit Wireless WOW, LLC.

3 47 C.F.R. § 24.203(b).

4 See 47 C.F.R. § 24.203(b).

5 Extension Request at 2. According to Summit, these six BTAs are characterized by "concentrations of small businesses, nearby vacation destinations (Big Sky Resort, Yellowstone National Park, Jackson Hole Resort, and Glacier National Park)," and the roads connecting these and other populated areas, which given the distance between them, "involves substantial travel time." Id.

are “not currently being served by any wireless carriers or sporadic coverage is being provided by limited wireless carriers.”⁶

3. Without grant of extension of time or waiver of the PCS construction rule, Summit’s licenses automatically terminated as of the April 28, 2002 construction deadline for failure to meet the construction requirements. Pursuant to sections 1.946(e) and 24.843(b) of the Commission’s rules, an extension of time to meet the construction requirements may be granted if the licensee timely makes the request and demonstrates that the failure to complete construction is due to causes beyond its control.⁷ Moreover, the Commission has stated that, in situations in which the circumstances are unique and the public interest would be served, it would consider waiving the PCS construction requirements on a case-by-case basis.⁸ Pursuant to section 1.925 of the Commission’s rules, waiver may be granted if the petitioner establishes either that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that grant of the waiver would be in the public interest; or (2) where the petitioner establishes unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.⁹

4. In this case, we find that a limited waiver of the broadband PCS construction rule is warranted due to the unique circumstances involved and the public interest in allowing Summit to implement its proposed plan to bring service to rural and otherwise underserved areas. We find this situation is unique due to a combination of factors. First, the six BTAs in question are relatively rural markets, both in terms of population and population density.¹⁰ Our research found that the vast majority of the population in the twenty-one counties that comprise the six BTAs lives in “rural” areas, as set forth by the Census Bureau.¹¹ We have found that rural markets are, as expected, more likely to be

⁶ See Letter to Scott Mackoul, Esq., Federal Communications Commission, Wireless Telecommunications Bureau, from Thomas Gutierrez and Todd Slamowitz, counsel for Summit, dated May 8, 2002 (Supplement). Summit provided a list of unserved areas in five of the six BTAs that it plans to initially cover. Summit amended the Supplement on June 6, 2002, to include information on its projected construction efforts in the sixth market. See Letter to Scott Mackoul, Esq., Federal Communications Commission, Wireless Telecommunications Bureau, from Thomas Gutierrez and Todd Slamowitz, counsel for Summit, dated June 6, 2002.

⁷ See 47 C.F.R. §§ 1.946, 24.843. Section 1.946(e) includes examples of specific circumstances that would not warrant an extension of time to complete construction. 47 C.F.R. § 1.946(e)(2)-(3).

⁸ PCS MO&O at 5019, citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

⁹ 47 C.F.R. § 1.925. Alternatively, pursuant to section 1.3, the Commission has authority to waive its rules if there is “good cause” to do so. 47 C.F.R. § 1.3. See also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

¹⁰ Our research indicates that all but one of the six BTAs are in the lower third of all BTAs in terms of population with the sixth BTA (Missoula, MT BTA) just short of the lower-third category. The upper two-thirds of BTAs in terms of population represent approximately 96% of the total U.S. population. Our analysis herein focused on the 487 BTAs encompassing the 50 States and is derived from the 1990 U.S. Census; there are an additional six BTAs that make up U.S. territories and possessions. We also note that, of the twenty-one counties that comprise the six BTAs, all but three are outside the top 1000 counties in terms of population (which make up approximately 86% of the total U.S. population). Additionally, as Summit points out, all of the six BTAs have a population density of less than 15 persons per square mile, ranking in the lower 15% of all markets in terms of population density. We also note that thirteen of the twenty-one counties comprising the six BTAs have a population density below 5 persons per square mile.

¹¹ In fact, 100% of the population in the following seven of the twenty-one counties live in “rural” areas: Broadwater, Granite, Jefferson, Madison, Mineral, Sanders, and Yellowstone National Park. This information was calculated from the 1990 U.S. Census, found on the Census Bureau’s website (www.census.gov).

underserved by virtue of their sparse population than more urban areas.¹² Summit's proposed service to these markets, including, specifically, the underserved areas set forth in Appendix A, is consistent with statutory and Commission policy directives to ensure service to rural areas using licenses that are awarded through competitive bidding,¹³ Commission statements encouraging PCS service to rural areas,¹⁴ and recent action by the Wireless Telecommunications Bureau's Commercial Wireless Division on similar requests for extension of time involving rural and sparsely-populated areas.¹⁵ Moreover, as we have noted in similar requests,¹⁶ even to the extent that some commercial wireless carriers are providing service to parts of the BTAs, Summit's proposed build-out will benefit consumers in terms of the choices available to them and is likely to promote vigorous competition in the marketplace.

5. Second, Summit has done a substantial amount of work to meet the coverage requirements despite the fact that it only recently acquired the licenses. Summit acquired these six licenses less than 16 months before the five-year construction deadline.¹⁷ Therefore, even with the additional four months it has requested, Summit will only have had 20 months to meet a construction benchmark that F-block licensees are normally given five years to meet. Given this short time, Summit has been diligent in constructing its system throughout the six BTAs to the extent possible, including ordering all necessary equipment, finalizing the location for approximately 80 percent of the anticipated sites necessary to meet its coverage requirement in the six BTAs, and generally beginning installation of the network in these areas.¹⁸ We find that this level of diligence and the relatively short period Summit has held the licenses before the deadline, when combined with Summit's commitment to providing service to rural, underserved areas within these BTAs, warrants a limited extension of time. Therefore, we grant Summit's request for an additional four months (*i.e.*, until August 28, 2002).

6. Because Summit's service to rural areas is a critical component to grant of an extension, we do so on the condition that Summit must, in addition to the 25 percent coverage benchmark, provide service to the portions of the BTAs that it has committed to serve in its request. Specifically, the licensee must, by August 28, 2002, provide coverage to (i) 25 percent of the population of each of the six BTAs, and (ii) to the specific roadways listed in Attachment A. As with construction requirements in general, we require Summit to notify the Commission no later than fifteen days following the deadline that it has

¹² See, e.g., Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Sixth Report*, FCC 01-192, Appendix C, Table 5 (rel. Jul. 17, 2001) (demonstrating that, of the lower quartile of counties in terms of population, only 18.0% have 3 or more mobile telephone providers compared to 93.2% of the highest quartile of counties).

¹³ See 47 U.S.C. § 309(j)(4)(B) ("...the Commission shall...include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas...").

¹⁴ See, e.g., Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 9 FCC Rcd. 4957, 5018 (1994) (*PCS MO&O*) ("ensure that PCS service is made available to as many communities as possible and that spectrum is used efficiently").

¹⁵ See, e.g., Leap Wireless International, Inc., Request for Waiver and Extension of Broadband PCS Construction Requirements, *Memorandum Opinion and Order*, 16 FCC Rcd. 19573, 19577 (WTB Comm. Wir. Div. 2001) (*Leap*).

¹⁶ See, e.g., Trustee in Bankruptcy for Magnacom Wireless, LLC and Telecom Wrap Up Group, LLC, Petition for Waiver and Extension of Broadband PCS Construction Requirements, *Order*, DA 02-1243 (rel. May 24, 2002).

¹⁷ The parties consummated the assignment of five of the six licenses in late December 2000 and June 2001 for the sixth license. See File Nos. 0000322097 and 0000499102.

¹⁸ Extension Request at 3.

met the requirements set forth herein.¹⁹ Failure to meet either of these construction benchmarks will result in automatic termination of the particular license as of the new construction deadline.

7. Finally, as we have done with other extensions of time to meet the construction requirements,²⁰ we extend the restrictions on broadband PCS F-block licenses that were intended to coincide with the completion of the five-year construction requirement.²¹ Specifically, section 24.839(a) of the Commission's rules prohibits the transfer of control or assignment of F-block broadband PCS licenses unless the filing of the application for assignment or transfer of control occurs five years after the date of the initial license grant or following the licensee's notification to the Commission that its five-year construction requirement has been satisfied.²² Moreover, section 1.2111 of the Commission's rules requires that unjust enrichment payments be made to the Commission in circumstances in which F-block licenses are transferred or assigned prior to five years from the date of initial license grant.²³ Because both of these restrictions were intended to coincide with the licensee meeting the five-year construction requirement,²⁴ we extend the prohibition of section 24.839 against the transfer of control or assignment of the instant licenses to non-eligible entities, and the unjust enrichment payment requirements of section 1.2111, until the licensee notifies the Commission that it has satisfied the construction requirements set forth herein with regard to each license individually.

8. Accordingly, IT IS ORDERED, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and sections 0.331, 1.925, and 1.946 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.925, 1.946, that the Request for Waiver and Extension of the Broadband PCS Construction Requirements filed by Summit Wireless, LLC and Summit Wireless WOW, LLC on March 21, 2002 IS HEREBY CONDITIONALLY GRANTED to the extent provided herein.

¹⁹ See 47 C.F.R. § 1.946(d).

²⁰ See, e.g., *Leap* at 19580-81.

²¹ See Amendment of the Commission's Rules Regarding Installment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd. 16266, 16290-91 (2000) (*PCS Restructuring Order*).

²² 47 C.F.R. § 24.839(a).

²³ 47 C.F.R. § 1.2111.

²⁴ *PCS Restructuring Order* at 16290-91.

9. IT IS FURTHER ORDERED, pursuant to authority delegated by section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and by section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, that the requirements of sections 1.2111 and 24.839 of the Commission's rules, 47 C.F.R. §§ 1.2111, 24.839, BE EXTENDED for the licenses that were the subject of the instant request until the licensee notifies the Commission that construction requirements set forth herein have been met.

FEDERAL COMMUNICATIONS COMMISSION

Roger S. Noel
Deputy Chief, Commercial Wireless Division
Wireless Telecommunications Bureau

ATTACHMENT A

**Rural Areas Summit Wireless, LLC and Summit Wireless WOW, LLC Proposes to Serve by the
End of the Extended Construction Period**

Bozeman, Montana BTA (BTA053)

Gallatin County – along Highway 191 from Bozeman to Big Sky

Butte, Montana BTA (BTA064)

Beaverhead County – along I-15 from Butte to Idaho Falls

Helena, Montana BTA (BTA188)

Lewis & Clark County – along I-15 from Helena to Great Falls

Jefferson County – along I-15 from Butte to Helena

Kalispell, MT BTA (BTA224)

Flathead County – Kalispell, Whitefish, Columbia Falls and Somers

Missoula, Montana BTA (BTA300)

Mineral County – along I-90 from Idaho border to Missoula

Ravalli County – along Highway 93 from Missoula to Hamilton

Riverton, Wyoming BTA (BTA375)

Freemont County – along Highway 26 from Jackson to Riverton